IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED, INC. and ELY VALLEY MINES, INC.,

Petitioners.

VS.

THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

NO. 22,700

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petitioners' Reply Brief

FILED

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Attorneys for Petitioners



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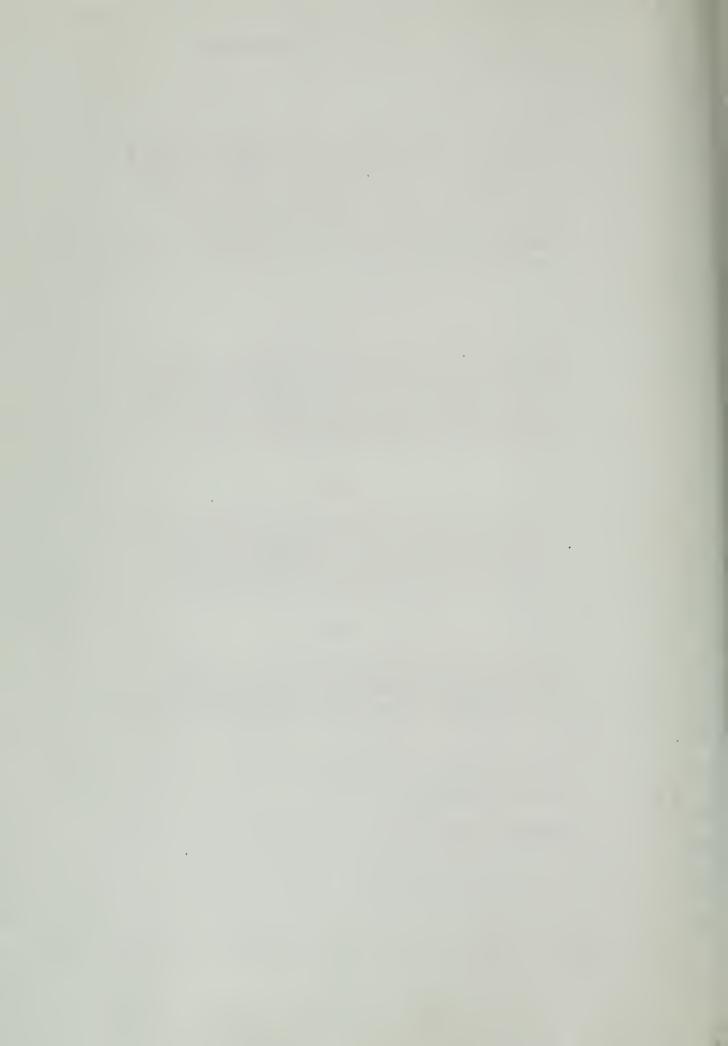
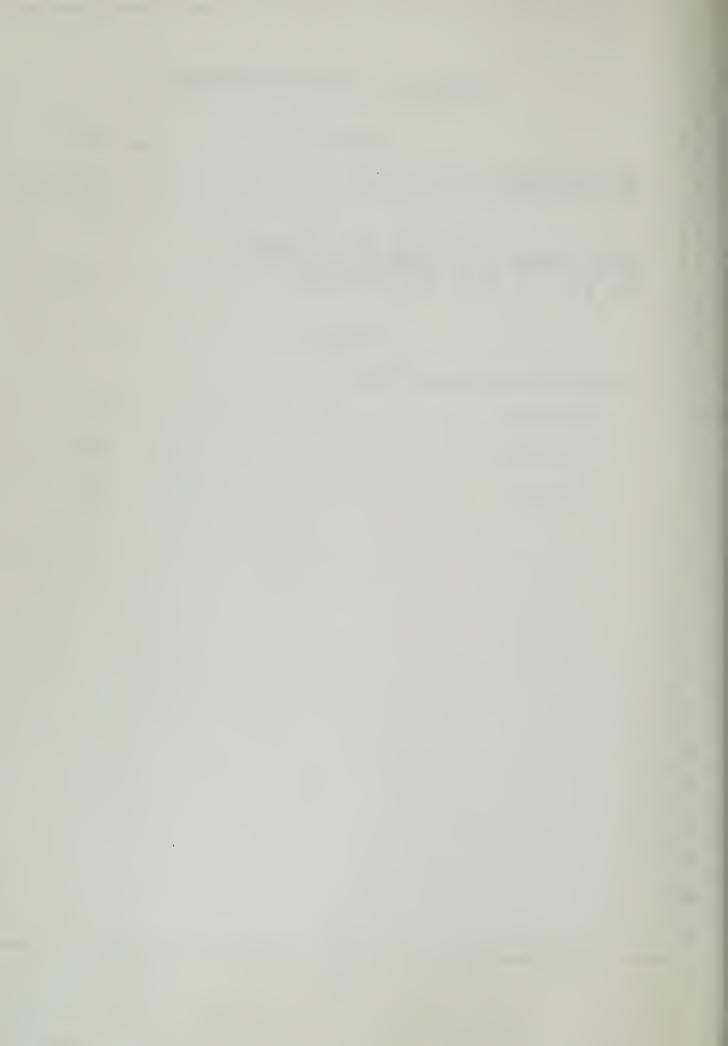


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Petition for Writ of Mandamus and Prohibition

PETITIONER'S REPLY BRIEF

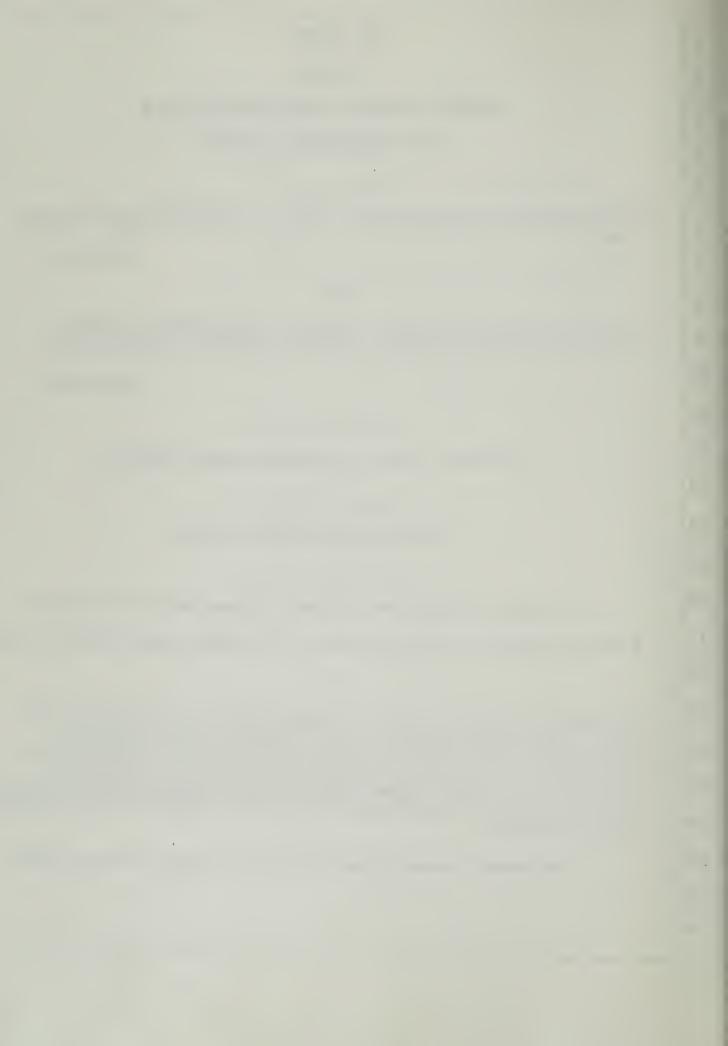
In reply to Respondent's Brief In Opposition To Petition For

A Writ of Mandamus and Prohibition, Petitioners submit the following:

I.

THE RESPONDENT COURT FURTHER ERRS IN ARROGATING TO ITSELF THE DISCRETION TO BOTH REMOVE OR REFUSE TO RECOGNIZE PETITIONERS' OFFICERS AND DIRECTORS AND TO WITHHOLD CORPORATE PROPERTIES UNTIL SATISFIED SAID OFFICERS AND DIRECTORS WILL HANDLE CORPORATE PROPERTIES IN A MANNER CONSISTENT WITH THE RESPONDENT COURT'S PREDILECTION.

Respondent characterizes the primary issue as being whether



the Respondent Court has abused its discretion in

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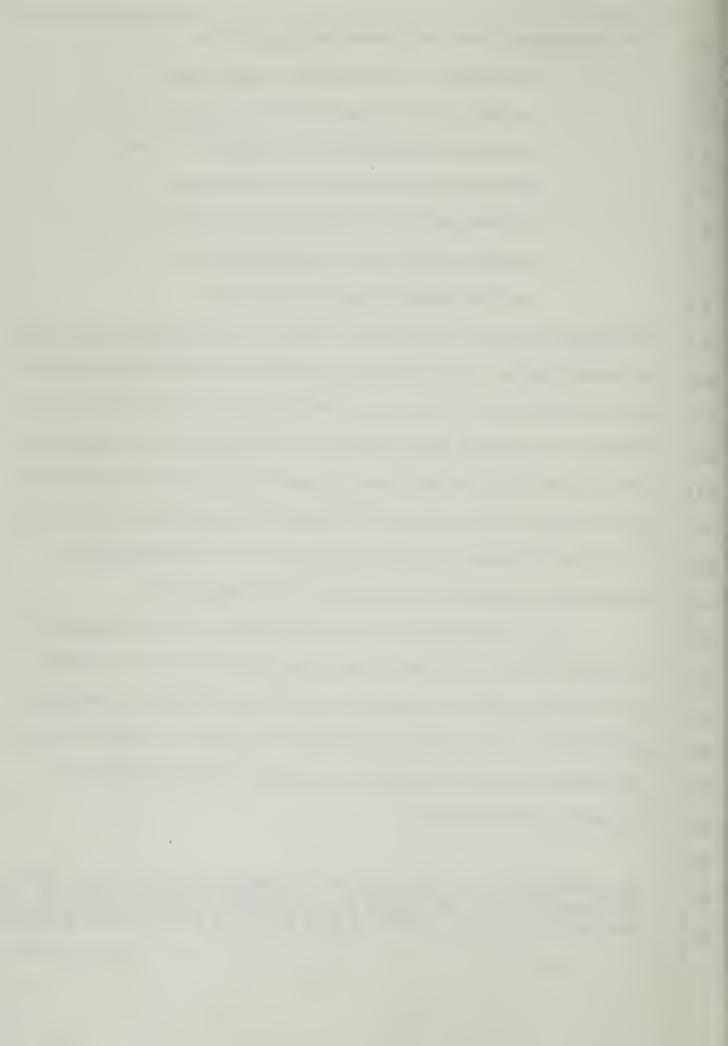
"refusing to return assets to each corporation until it is assured that the corporations have appropriate officers to whom the assets of the corporation may be returned and who will utilize the same for the benefit of the stockholders who are the owners of each corporation."

In calling the Court's attention to use of the conjunctive "and" in the aforesaid quote, it is clear that Respondent now takes the position that the lower court may, as a condition precedent to the return of Petitioners' records and properties, both adjudicate the validity of Petitioners' officers and directors and then require assurance that such officers and directors will utilize said properties and records in a certain manner. This is tantamount to an expropriation of corporate government and management by Respondent.

It is respectfully submitted that under the circumstances of the instant case, Respondent has abused his discretion in refusing to return Petitioners' properties and records pending an attempted adjudication of the validity of Petitioners' officers and directors and the propriety of their intentions regarding the use of Petitioners' properties and records.

II.

RESPONDENT'S DISCRETION TO FURTHER WITHHOLD THE RETURN OF PETITIONERS' RECORDS AND PROPERTIES PURSUANT TO THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. v. LEE,



385 F. 2d 188 WAS, BY HIS OWN ADMISSION, EXHAUSTED.

It is true that this Court, in its decision of <u>Ely Valley Mines</u>, <u>Inc. v. Lee</u>, supra, declared:

"The properties and records should be surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason." (emphasis added)

Respondent's current position (as articulated by counsel for Plaintiff Helen Dolman and Receiver Americo Campini) purports to find support in the above quoted portion of this Court's opinion in the aforesaid decision. It is submitted, however, that Respondent has admitted that the only remaining impediment to the prompt return of Petitioners' properties and records is the judicial determination of proper corporate officers and directors to receive them. In the words of the Respondent:

"The Board of Directors are authorized, and the only ones authorized to elect the officers. I want to turn this property back right now to the proper custodians and representatives of these corporations, but I don't know who they are." Tr. B-26:5-9 (emphasis added)

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Respondent thus made the only obstacle to the return of the properties a determination by the lower court as to the validity of Petitioners' officers and directors -- an "issue" beyond the jurisdiction of the Respondent Court! Respondent is estopped to deny the foregoing premise.

Respondent contends that it is now within his discretion to allow the wrongfully appointed receiver to continue his six plus years of wrongful possession of Petitioners' properties and records on the basis that Petitioners have no valid officers and directors and that the "pretenders" to such offices are engaging in or intending to engage in conduct which is adverse to the stockholders. Petitioners deem it unnecessary to further burden this Court with reasons why Respondent is without discretion or jurisdiction to adjudicate or re-litigate the legal status of Petitioners' officers and directors. Petitioners merely re-assert the clarity of this Court's opinions in both Ely Valley Mines, Inc. v. Lee, supra, and Pioche Mines Consolidated, Inc. v. Dolman, 333 F. 2d 257, cert. den., 380 U.S. 956, 85 S. Ct. 1081, 13 L. ed. 2d 972. In combination, the two cases hold that Petitioners' officers and directors have not been outlawed or removed and that the case in chief (No. 311 below) is not a proper action for providing such relief.

Respondent seeks to justify his intrusion into the aforesaid area where jurisdiction is lacking by referring to extraneous attempted wrongs on the part of Petitioners officers and directors. It is to be noted first that even assuming, arguendo, that Petitioners' officers and directors were dedicated to a course of action inimical to the



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interests of the stockholders, this fact alone would hardly justify Respondent's attempt to defrock said officers and directors. This premise is sustained and emphasized by the fact that prior to this Court's decision in <u>Ely Valley Mines</u>, <u>Inc. v. Lee</u>, supra, the Court was virtually inundated with the alleged wrongdoings and mismanagement of the late John Janney and in spite thereof, held that Janney had not been outlawed or removed from office and that Respondent could not withhold the immediate return of Petitioners' properties and records because of the fact that Janney was still president of each corporation.

Secondly, since Petitioners do not deem it proper or necessary to pursue such alleged and diversionary "wrongs" as the intended compromise of the one million dollar judgment against Janney -- such alleged wrongs being outside the scope of the issues before this Court -- Petitioners will primarily beg this Court's indulgence and deny that their officers or directors have taken any action or course of conduct deemed detrimental to the stockholders. If this Honorable Court desires to inquire into the matter further during oral argument, Petitioners' counsel shall be most willing to answer any questions this Court may have. Petitioners know of no rule of law or equity that will cause an automatic loss of authority or office on the part of corporate officers and directors merely because of alleged wrongdoing. Such a result would be a clear deprivation of due process. Respondent nevertheless seeks to do just that; he has attempted to use an action which has sought no relief against these petitioning corporations in



such a manner as to devitalize or defrock Petitioners' officers and directors and leave them powerless to act. Such conduct on the part of the Respondent Court is especially incredulous and astounding in respect of the Petitioner Ely Valley Mines, Inc. since it has been dismissed out of the action below. It is thus clear, from a practical and realistic standpoint, that said dismissal is a paper mirage, for the Petitioner Ely Valley Mines, Inc. remains a beleaguered defendant in No. 311 below, forced to continue a costly course of litigation in order to "walk out" of the lower court without leaving its records, properties and indeed its officers and directors, behind.

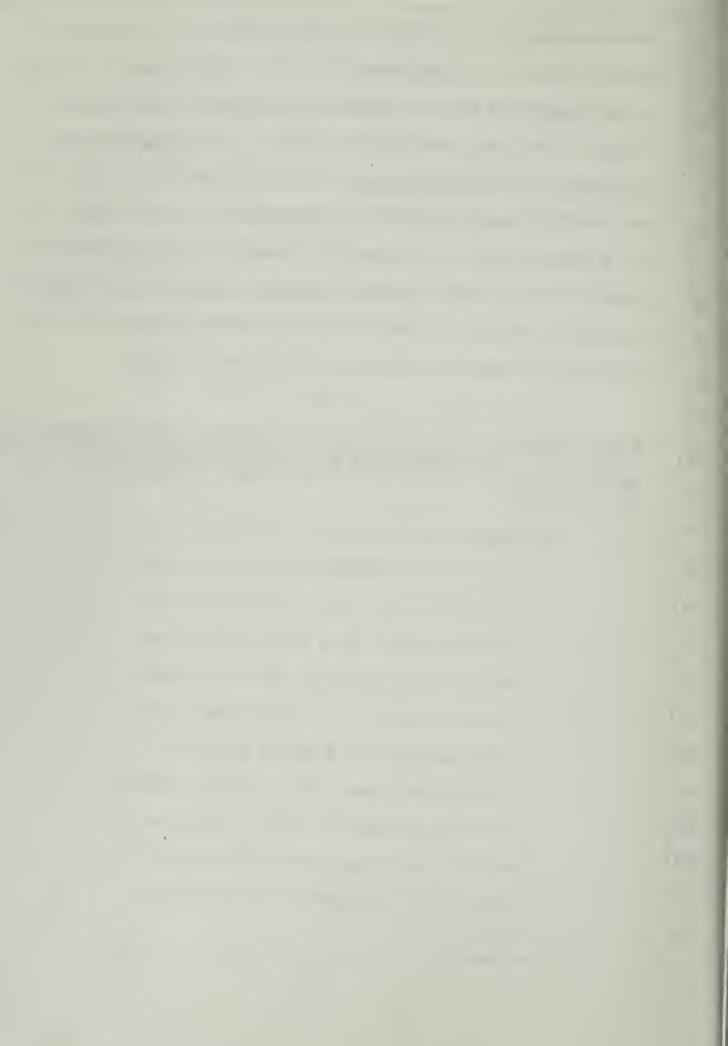
III.

PETITIONERS ARE COMPELLED TO CORRECT THE RECORD AS TO CERTAIN FALSE ASSERTIONS SET FORTH IN RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION.

Respondent would have this Court believe that:

"the evidence presented to the Respondent Court by the petitioning corporations discloses that there were no meetings of the Board of Directors from 1954 (see Exhibit G to the petition on file herein) until a purported meeting of a Board of Directors held at the Parker House Hotel in Boston, Massachusetts on October 4, 1967, an intervening period of more than thirteen (13) years."

(See p. 7 of Respondent's Brief In Oppostition)



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Respondent then justifies his finding as to no valid boards of directors on the above false premise as follows:

> "Based upon this disclosure and being competently aware of the manner in which these corporations were mismanaged by John Janney during his tenure of office in which he purported to operate each corporation as a sole proprietorship contrary to the best interests of the stockholders, the Respondent Court has repeatedly and does now adhere to the position that there are no proper directors of either corporation..." (See pp. 7-8 of Respondent's Brief In Opposition)

(Emphasis added)

First, it is important to note that the assertion as to the thirteen (13) year interval between directors' meetings is patently false. Respondent erroneously cites, in support of his contention, Exhibit G to the petition on file herein. Respondent clearly intended to cite Exhibit H to the petiton on file herein, which Exhibit is entitled "Defendants' Reply Memorandum To Plaintiffs' And Receiver's Memorandum In Opposition To Motion For Return Of Corporate Properties." Attached to the aforesaid Reply Memorandum (Exhibit H) were sample minutes consisting of exhibits G through M. These sample minutes were furnished Respondent Court in order to disprove an earlier false assertion by Plaintiffs' and Receiver's counsel to the



effect that there had "never been a meeting of the Board of Directors at one place or one time." However, in order to make it clear that said minutes did not purport to represent the total of such meetings over the periods involved, Petitioners' said Exhibit H Reply Memorandum stated as follows:

"Attached hereto as Exhibits G, H, I, J, K, L and M are copies of a series of sample meetings of the Boards of Directors dating from 1954 to the present. These minutes do not, in any sense, represent the total of such meetings."

(See p. 9 of Exhibit H to the instant Petition)

Petitioners here reassert the falsity of Respondent's position as to directors' meetings, and stand ready to prove same if this Court should so request.

Respondent's position as to the basis for "repeatedly" adhering to his position that Petitioners have no valid officers or directors is thus pinned to (1) a patently false premise as heretofore indicated; and (2) a persistent disregard of this Court's mandate as to the legal status and entitlement of the late John Janney as president of each of the petitioning corporations.

In passing, it should be noted that Respondent repeats the false assertion concerning the thirteen (13) year interval between directors' meetings on pages 10 and 20 (in the latter case the alleged interval



jumps to twenty-three (23) years) of Respondent's Brief In Opposition.

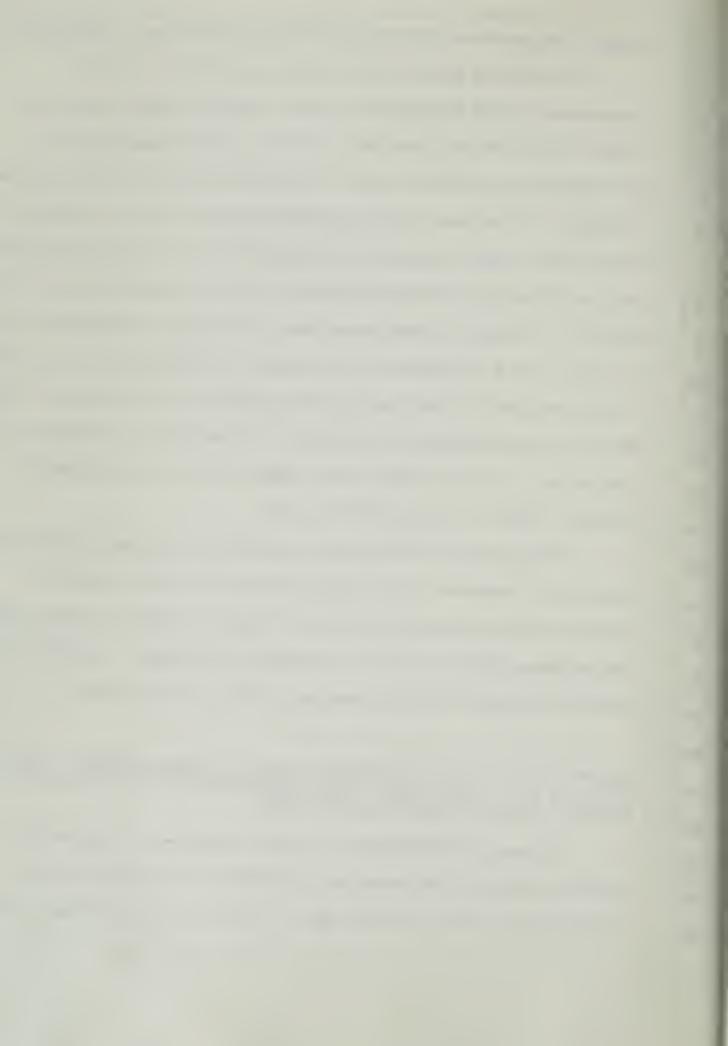
Attention is also drawn to false assertions on page 21 of Respondent's Brief In Opposition which, contrary to the evidence on record, indicates that there was never any election of directors by the stockholders and that the late John Janney refused to hold directors meetings. In the same vein, Respondent falsely asserts, on page 23 of said Brief, that "no one of the individuals presently contending that they are directors of either corporation has been elected by the stockholders." In reply to these assertions, Petitioners shall merely refer to pages 8 and 9 of Exhibit H to the petition on file herein and note that Petitioners filed in open court a sworn affidavit of one Francis G. Shaw director and secretary of the petitioning corporations, attesting to his election as a director of Ely Valley Mines, Inc., at a stockholders' meeting. (See Tr. N-5: 14-25; 6: 1-16)

Parenthetically, Petitioners desire to re-emphasize that they disavow any endeavor to show disrespect for the lower court and specifically Respondent, the Honorable Roger T. Foley, Judge of the United States District Court for the District of Nevada. Nothing said herein is intended to show disrespect for the said Respondent.

IV.

RESPONDENT ERRS IN ASSUMING THAT A CORPORATION, UNDER NEVADA LAW, REMAINS A CORPORATE ENTITY IN SPITE OF HAVING NO OFFICERS OR DIRECTORS.

On page 9 of Respondent's Brief in Opposition, Respondent refers to Nevada's hold-over statute (NRS 78.340) previously cited by Petitioners in their Opening Brief, and then merely avoids its clear



import by stating it cannot be divorced and read independently of the other statutory provisions relating to private corporations, and concludes that:

"The corporation remains as a corporate entity but it is apparent that there are no validly elected directors or officers to whom the assets may properly be delivered."

Under the terms of NRS 78.150 (1) an annual list of officers, directors and resident agent must be certified by a president, secretary or other corporate officer and filed with the Secretary of State along with a filing fee. If this is not done within a specified time, then under the terms of NRS 78.175 the defaulting corporation will have its charter revoked. It is to be emphasized, therefore, that if Petitioners' officers and directors had not complied with the requirements of NRS 78.150 (1), as noted above, since 1962 when Respondent first held that Petitioners had no valid directors or officers, their respective charters would have been revoked thus terminating the corporate entity. Under Nevada law, as cited above, only a corporate officer may file the required annual list, and hence, no officers, no list; and if there are no officers and no annual list, the end result becomes no corporate entity by virtue of the revocation of the corporation charter.

In conjunction with Petitioners' position under this point of reply, and to the extent allowed by this Court, Petitioners aver that never have their officers and directors assumed and maintained their respective positions by force; they have functioned consistently and



continuously to supply necessary corporate government and management. They have constantly seen that corporate properties were preserved by providing necessary assessment work and taxes in spite of a complete lack of income or productivity because of vexing litigation. They have also taken all necessary measures to preserve Petitioners' good standing as corporations in the state of Nevada. Petitioners' officers and directors have never had any other group represent or hold themselves out to be competitor officers and directors.

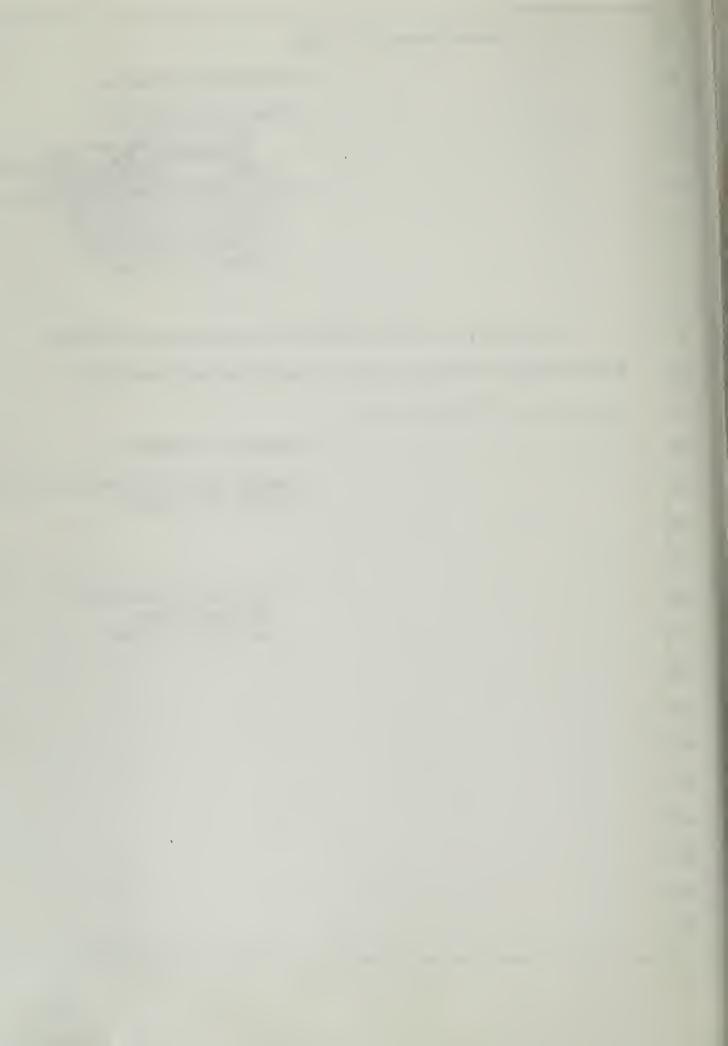
Petitioners deem it unnecessary to reply to Respondent's contention that Petitioners' officers and directors do not even have a colorable claim or title to office. The facts speak out to the contrary

CONCLUSION

Petitioners have not sought to increase the proliferation of paper work in this proceeding by replying to each contention set forth in Respondent's Brief In Opposition. With due respect, it is earnestly asserted that none of the points raised by Respondent are of merit in the instant proceeding. Petitioners respectfully submit that the Respondent Court is no longer lawfully or equitably entitled to further defer compliance with the mandates of this Honorable Court as per Ely Valley Mines, Inc. v. Lee, supra, and Pioche Mines Consolidated, Inc. v. Dolman, supra. It is respectfully urged that the Respondent Court be allowed no further discretion in the premises, and that the writs issue from this Honorable Court as heretofore prayed.



1	Dated October 10, 1968.
2	Respectfully submitted,
3	JOHNSON & STEFFEN
4	
5	Betterpen
6	THOMAS L. STEFFEN Counsel for Petitioners
7	112 North Third Street Las Vegas, Nevada
8	
9	RECEIPT OF TWO COPIES of the above and foregoing
10	PETITIONERS' REPLY BRIEF is hereby acknowledged this
11	day of October, 1968.
12	SAMUEL C. SHENK
13	SINGLETON, DELANOY, JEMISON
14	& REID, Chartered
15	→ BY
16	Counsel for Respondents
17	302 East Carson Las Vegas, Nevada
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2	FOR THE NINTH CIRCUIT
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5	and ELY VALLEY MINES, INC.,
6	Petitioners,
7	vs.
9	THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITES STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,
10	Respondent.
11	AFFIDAVIT OF SERVICE
12	STATE OF NEVADA)
13	COUNTY OF CLARK) ss:
14	TERRY V. MARSDEN, being first duly sworn, desposes and
15	says: That on the 10th day of October, 1968, she delivered a copy
16	of Petitioners' Reply Brief to The Honorable ROGER T. FOLEY, at
17	his office in the United States District Court, Federal Building, Las
18	Vegas Boulevard South, Las Vegas, Nevada.
19	DATED this 10th day of October, 1968.
20	
21	Terry V. Marsden Terry V. Marsden
22	SUBSCRIBED AND SWORN to
23	before me this 10th day of October, 1968.
24 25	Notary Public - State of Nevada CLARK COUNTY Charles William Johnson My Commission Expires Sept. 2, 1972
	THE PROPERTY OF THE PROPERTY O

